SUPREME COURT, U. S.

JUN 3 1975

MICHAEL RODAK, JR., CLERK

# Supreme Court of the United States

**No. 74-1389**
**October Term, 1974**

JAMES AMENT, *et al.*,
*Petitioners,*

vs.

DR. ROBERT J. BROCKER,
*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH APPELLATE JUDICIAL DISTRICT OF THE STATE OF OHIO

## BRIEF OF RESPONDENT IN OPPOSITION

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## BRIEF OF RESPONDENT IN OPPOSITION

## STATEMENT OF THE CASE

### I.

This action originated in the Petitioners' claim for damages against the Respondent neurosurgeon based upon separate acts of alleged negligence, all predicated on the diagnostic, surgical, and post-surgical care procedures employed by Respondent.

Ten months after the surgery performed by Respondent, the Petitioner James Ament manifested a condition diagnosed as paraplegia. He consulted neurosurgeons and others to determine the cause of his condition, but without success. Nevertheless, he sought to establish a causal connection between his condition and the Respondent's procedures, and negligence on the Respondent's part.

## II.

Among others, an eminent neurosurgeon from the Cleveland Clinic testified on Respondent's behalf. In response to a hypothetical question based upon the Petitioner James Ament's history, X-ray reports, subjective complaints, objective findings, study and test results, the surgical follow-up, and other treatments employed, he opined that there was no connection whatsoever between the Petitioner James Ament's paraplegia in September of 1970 and the Respondent's surgery in October of 1969 or his subsequent conduct. He also testified he found no evidence of wrong or negligence in Respondent's medical treatment of Petitioner James Ament.

During trial several expert witnesses, including Petitioners, testified as to their opinions. The Trial Court so noted in his general charge to the jury and instructed the jurors they were to determine the weight to be accorded to those opinions, and that the issue of negligence was theirs to decide.

## III.

Respondent's expert witness underwent a thorough and lengthy cross-examination. Though both the direct and cross-examinations were addressed to Respondent's surgery and conduct with regard to Petitioner James Ament only, Petitioners sought to admit into evidence a letter written by that witness two years after Petitioner James Ament's surgery regarding the Respondent's handling of other patients and their cases. Petitioner was not one of them. The letter, copied on pages A26-A27 of the Petition in this Court, tended to reflect on Respondent's reputation as a neurosurgeon. At no time did Respondent's or Petitioners' expert witnesses testify as to Respondent's

reputation. It was not an issue in the case. Accordingly, the Trial Court refused to admit the letter in evidence.

At the conclusion of the trial that spanned nearly two weeks, the jury returned a verdict in favor of the Respondent.

In their appeal from that verdict, the Petitioners asserted several assignments of error, none of which were based on a constitutional issue. As implied by Petitioners in their Petition herein, they first raised the constitutional issue in their appeal to the Ohio Supreme Court. (Petition, page 6).

## REASONS FOR DENYING THE WRIT

### I.

The Petitioners first raised the claimed constitutional issue in their appeal to the Ohio Supreme Court. In the Trial and Appellate Courts, the admissibility of the letter and the expert witness's opinion as to Respondent's conduct with regard to Petitioners were argued solely within the context of laying a proper foundation for evidence and the bounds of relevancy.

On certiorari, the Petitioners must show that the constitutional issue was raised in the court of first instance, in timely and proper fashion.

Rule 23(1)(f), Rules of Supreme Court

Petitioners failed to raise any constitutional issue in either the Trial or Appellate Court. The error they claimed there was based solely on local, evidentiary law. Not until their appeal to the Ohio Supreme Court did they characterize the matter as one with constitutional dimension. The issue was not, therefore, raised in a timely fashion.

The right to raise a constitutional issue is forfeited by the failure to assert it in the lower courts. It cannot be raised for the first time in the highest appellate court of the State.

*Yakus v. U. S.*, 321 U.S. 414, 444.

*Bailey v. Anderson*, 326 U.S. 203, 206.

Moreover, Ohio law mandates that constitutional issues must be raised in its lower courts, i.e., Common Pleas and Appeals Courts.

*State v. Jones*, 4 Ohio St. 2d 13, 13-14.

*State v. Wallen*, 25 Ohio St. 2d 45, 46.

Such a rule is a proper exercise of state power and failure to comply with it is grounds for the denial of a petition for certiorari. Petitioners failed to so raise the constitutional aspects of the evidentiary issue in both the Common Pleas and Appeals Courts, and their Petition should be denied.

*Herndon v. Georgia*, 295 U.S. 441, 443.

*Williams v. Georgia*, 349 U.S. 375, 382-383.

*Layton v. Missouri*, 187 U.S. 356, 358-361.

## II.

The constitutional implications in Petitioners' assertions are exceedingly remote. Every evidentiary issue has some connection with the due process, fair trial, and confrontation of witnesses' concepts. But not every one involves constitutional questions. The State courts are generally free to construe and apply their laws with respect to evidence, unless some substantial constitutional provision is violated.

*Perez v. Ledesma*, 401 U.S. 82, 84.

*Lisenba v. Calif.*, 314 U.S. 219, 227, 228.

To prohibit cross-examination is one thing, and a constitutional issue may well be involved. To allow full and extensive cross-examination, as the Petitioners were, but limit it to areas somehow relevant to the issues and to matters for which a proper foundation has first been established, cannot be deemed a denial of due process.

The letter the Petitioners introduced was excluded on the basis of the rule which prohibits admission of a witness' extra-judicial statements as hearsay, unless it can be classified as a statement inconsistent with his testimony with a proper foundation first laid. The rule is not unusual or peculiar to Ohio. It is well settled and recognized throughout American law in both the federal and state court systems.

58 AM. JUR. 770, *Witnesses*, page 421.

98 C.J.S. 582-603, *Witnesses*, pages 556-594.

The ordinary, well settled, universally recognized rules of evidence as to the requirements for a proper foundation for the reception of extra-judicial statements of a witness in a State court present no federal question at all.

## III.

The facts and judicial rulings in this case do not raise the questions asserted by Petitioners. Neither Respondent nor the Ohio courts deny the applicability of the due process, fair trial, and confrontation of witnesses' constitutional provisions to civil trials. Nor is the right to impeach a witness by prior or subsequent statements contradictory to his testimony denied.

The trial and appellate courts made a factual determination that no contradiction between the letter and the testimony existed. A writ of certiorari should not be

granted merely to review the evidence or inferences which might be drawn from it.

*General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178.

*Bandini Co. v. Superior Court*, 284 U.S. 8, 18.

For the foregoing reasons, Respondent contends that the Petition and a Writ of Certiorari should be denied.

Respectfully submitted,

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